Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

KRISTIN HILL BRASSER KUELBS; KRISTIN N. KUELBS IRREVOCABLE TRUST, PETITIONERS

v.

KIMBERLY HILL; JEFFREY HILL; CAROL HILL; LYNN WELK (HILL); LAWRENCE WELK, JR.; RYAN BENSON; AMERICAN CENTURY SERVICES, LLC; AMERICAN CENTURY INVESTMENTS; RITA ABERNATHY; ANNE TUTTLE; JOHN DOES 1-10

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Due to the complexity of the time-line of facts and filings which are critical to understanding the "Questions Presented for Review," a brief background is provided.

When Kristin Kuelbs failed to receive her monetary, real and personal property assets amounting to $310,000.00, she and her Irrevocable Trust to which she had assigned many of her assets, causes of action and damages brought suit against the named Defendants to recover same when Defendants refused numerous requests to provide an accounting. Defendant siblings had gained control of Kuelbs' assets through the breach of several contracts and the misuse of a forged and fraudulent power of attorney for which M.S.A.§523.22 and 18 U.S.C. §§1961, respectively, provide for treble damages and statutory attorneys fees.

Eight (8) months into the litigation, on March 10, 2009, Community First Trust Company was appointed as the conservator of Kuelbs' estate. On March 19, 2009, Kimberly Hill was appointed as the guardian of the person of Kristin Kuelbs, although Kuelbs was not declared to be legally incompetent by the Arkansas Probate Court, only "incapacitated."

In such circumstances, Arkansas Code Annotated §28-65-106 specifically states as to the "Rights of Incapacitated Persons" that:

> "An incapacitated person for whom a guardian has been appointed is not presumed to be incompetent and retains all legal and civil rights except those

> which have been expressly limited by the court order or have been specifically granted by order to the guardian by the court."

The March 19, 2009, guardianship order did not expressly limit any of Kuelbs' rights nor were any specific rights granted to Kimberly Hill in the order.

On April 14, 2009, the District Court having apparently learned of the March 19, 2009, order of the Garland County Probate court, *sua sponte* entered a Briefing Order requiring the parties to brief the issue of "real party in interest."

Regardless, of Ark. Code Ann. §28-65-106, both Kimberly Hill, the guardian of the person, and Community First Trust Company, the conservator of Kristin's estate, refused to intervene and substitute in as Kuelbs' "real party in interest" in the ongoing litigation.

When both the guardian and conservator refused to substitute into the case, pursuant to the content of Rules 17, 24 and 25 of the Federal Rules of Civil Procedure, the Plaintiffs moved the Court to appoint or recognize the Trustee of the co-Plaintiff Trust, as Kristin Kuelbs' "Next Friend" and "real party in interest" or in the alternative, to appoint a third-party "personal representative" or to otherwise enter an "appropriate" order to protect the property rights of Kristin Kuelbs and her continued access to the federal court system to recover her property, as a Plaintiff whom became "Not Represented" by virtue of the guardian and conservator's refusal to substitute in pursuant to FRCP 25(b).

The District Court denied Plaintiffs' Motion for "Next Friend" to be substituted in and dismissed the case, claiming no party attempted to substitute in, and further, that the Trust had failed to plead, although clearly named in the heading and having filed responses to the various motions to dismiss and in supplementing the record before the 8th Circuit Court of Appeals.

Plaintiffs appealed the dismissal to the 8th Circuit Court of Appeals which affirmed the District Court's decision.

The 8th Circuit Court of Appeal's decision made no reference, finding, nor did it otherwise comment on the Plaintiffs' Motion for "Next Friend" or the requests to appoint a "personal representative" for Kuelbs to serve as her "real party in interest" to protect Kuelbs' fundamental right of access to the federal court system guaranteed her by the statutory mandates of Rules 17, 24 and 25 of the Federal Rules of Civil Procedure and the due process, equal protections to which Kuelbs is entitled as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution. (App. 1a -12a)

The 8th Circuit Court of Appeals also denied Appellants' Petition for Rehearing of the federal statutory and constitutional issues set forth above. (App. 1a-12a)

I. Whether the Court erred in dismissing the case after denying Plaintiffs' "Motion for Next Friend" made by Plaintiffs in accord with Rules 17, 24, 25 and the Fifth and Fourteenth Amendments to the U.S. Constitution, to protect Kuelbs' continued access to the federal court when the newly appointed conservator refused to intervene on behalf of Kuelbs to serve as her "real party in interest."

II. Whether the Court erred when eight (8) months into the litigation, Kuelbs was determined to be "incapacitated" and the newly appointed guardian and conservator both refused to intervene for Kuelbs who thereby became a Plaintiff "Not Represented," and the Court dismissed the case after failing to enter an "appropriate order" pursuant to FRCP 17(c)(2) to protect Kuelbs' fundamental constitutional right of continued access to the court to complete her ongoing litigation.

III. Whether the Court erred in dismissing the case by applying Ark. Code Ann. §16-61-105; as affirmed by the 8th Circuit Court of Appeals which construed and applied Ark. Code Ann. §28-65-305, holding that only a conservator could serve as the "real party in interest" for Kuelbs thus unconstitutionally denying her continued access to the court to recover her property and damages.

IV. Whether the Court erred in refusing to allow Kuelbs to continue the case in her own name in accord with the 8th Circuit Court's prior holding under similar procedural facts as the case those in the case of *Kolocotronis v. Morgan*, 49 F.R.S.3d 3, 247 F.3d 726 (CA8 2001), when her newly appointed

guardian and conservator refused to intervene and substitute in for Kuelbs as her "real party in interest," thereby rendering Kuelbs as a "Party Without a Representative" pursuant to FRCP 17(c)(2); FRCP 24(a)(2) and FRCP 24 (b)(1)(B).

V. Whether Kuelbs, being the Grantor/Settlor and sole Beneficiary of her Irrevocable Trust, may lawfully transfer her assets, non-personal injury tort claims, breach of contract claims and damages arising therefrom, to her Trust for the purpose of having the Trust, a co-Plaintiff, continue the ongoing litigation to recover Plaintiffs' assets and damages, as the transfer by Kuelbs to her Trust, was in reality, a transfer to herself.

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of Arkansas is reported at ____ F. Supp. 2d __ (W.D. Ark. 2009). (App. 13a-18a). The opinion of the United States Court of Appeals for the Eighth Circuit is reported at ____ F.3d ___ (8th Cir. 2010). (App. 1a-12a) The order denying Petition for Rehearing was filed September 08, 2010. (App. 19a)

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit affirming the District Court's *sua sponte* dismissal of Petitioner's Amended Complaint, was entered on July 30, 2010. (App. 1a-12a). Further, the Court's order denying Petitioners' timely filed Petition for Panel Rehearing or for rehearing *en banc*, was decided on September 08, 2010. (App. 19a).

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Contract Clause of Article I, §10:

> No State shall . . . pass any Law impairing the Obligation of Contracts.

United States Constitution, Amendment 5:

> No person shall be . . . deprived of . . . property, without due process of law . . . ."

United States Constitution, Amendment 14:

> All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

The following facts were provided to the Federal District Court in various pleadings and as Supplemented pursuant to Appellants' Motion granted by the 8th Circuit.

Kristin Kuelbs suffered minor brain injury in a March 2001 auto accident. (App. 2a) Kuelbs' husband filed for divorce and in 2004. Defendant Lynn Welk executed an attorney-client agreement with Defendant attorney, Anne Tuttle, on April 13, 2005, agreeing to pay Anne Tuttle's fees for her representation of Kristin Kuelbs in the divorce action.

Kristin Kuelbs was the client of divorce attorney, Anne Tuttle, vis a vis an express attorney-client agreement executed by Lynn (Hill) Welk whom agreed therein to pay the fees of Anne Tuttle, whom, pursuant to the Minnesota Code of Professional Conduct , was required to notify Kuelbs to make all material decisions in her ongoing divorce litigation.

In June 2005, Attorney Anne Tuttle prepared a Minnesota statutory form General Power of Attorney in the name of Jeffrey Hill, without the knowledge or permission of Kristin Kuelbs and forged Kristin Kuelbs' signature thereon. Thereafter, Anne Tuttle rarely communicated with Kristin Kuelbs whom resided 90 miles from Shakopee, Minnesota, where the divorce was then pending, but instead, dealt almost exclusively with Jeffrey Hill and Lynn (Hill) Welk in matters of the ongoing divorce which became final on January 05, 2006.

Condition 23 of the divorce decree ordered that the ex-husband was to direct-deposit Kuelbs' property settlement money in the amount of $263,744.00 into Kristin's open bank account.

When the ex-husband was prepared to direct-deposit Kuelbs' property settlement money into Kuelbs' open bank account, realizing that Kristin Kuelbs was not contractually obligated to pay the outstanding balance of Tuttle's attorneys fees in the approximate amount of $27,000.00 which Lynn (Hill) Welk had not paid as she had contracted to so do, Attorney Anne Tuttle and Jeffrey Hill agreed to have Jeffrey Hill utilize the forged and fraudulent power of attorney to obtain Kuelbs' property settlement money via an Amendment to the Decree of Divorce without Kuelbs' knowledge such that the $263,000.00 would be paid directly to Tuttle and not be direct-deposited into Kuelbs' personal bank account.

Jeffrey Hill and Anne Tuttle falsely represented to the divorce court that Kristin Kuelbs had previously closed her bank account into which the ex-husband was

ordered to direct-deposit Kuelbs' property settlement funds.

The misuse of a power of attorney is a violation of Minnesota Statutes [M.S.A §523.22], which requires the payment of treble damages and attorneys fees to the damaged party.

On March 24, 2006, pursuant to the misrepresentations made to the divorce Court that Kuelbs had previously closed her bank account, the Court agreed to Amend the Decree of Divorce such that Kuelbs' property settlement money of $263,744.00 would then be paid directly to Attorney Anne Tuttle rather than direct-deposited into Kristin's bank account. Kuelbs was never notified nor did she appear at the "hearing" conducted by the Court on the telephone with Tuttle, Jeffrey Hill and the ex-husband's attorney, whose correspondence indicates that the ex-husband doubted the validity of the Jeffrey Hill "power of attorney."

The Court's order Amending the Decree required Anne Tuttle to first verify the validity of the Jeffrey Hill power of attorney to which the ex-husband had strenuously objected in correspondence between the two parties' attorneys wherein Attorney Tuttle had continually refused to produce a copy of the Jeffrey Hill POA.

Upon receipt of Kuelbs' property settlement funds, attorney Anne Tuttle took her unpaid fees which Lynn Welk had failed to pay and proceeded to hold the balance of Kristin Kuelbs' property settlement money

for almost five (5) months without communicating that fact to Kristin Kuelbs.

On August 24, 2006, again without informing Kristin Kuelbs, attorney Anne Tuttle wire-transferred the balance of Kristin Kuelbs' property settlement money across state lines into a secreted American Century Services, LLC (dba American Century Services) brokerage account located in Kansas City, Missouri, as requested by Jeffrey Hill. Jeffrey Hill had once again utilized the forged and fraudulent power of attorney in his name to open a brokerage account with his address on the account such that he received all account statements in Eagan, MN. Kuelbs did not reside with Jeffrey Hill, but was living in the family lake home of which she was a 20% fee owner. Neither Jeffrey Hill, Lynn Welk nor Kimberly Hill advised Kuelbs of the secreted brokerage account.

Thus, contrary to the 8th Circuit Court of Appeal's Decision, (App. 2a, 3a), Kuelbs ***never*** received her "property settlement in excess of $250,000.00 . . . ." out of her divorce case when attorney Anne Tuttle and Lynn Welk breached the express attorney-client contract, and both Tuttle and Jeff Hill defrauded the divorce court such that Kuelbs never knew that her court-ordered property settlement money had been paid by the ex husband.

Kristin Kuelbs also never received the $45,845.77, from the sibling defendants fraudulent sale of her 20% fee ownership interest in the family lake home purchased by Lynn (Hill) Welk and Lawrence Welk, Jr., which sale closed in late August and early September 2006.

Kristin Kuelbs never executed, nor was she aware of the purchase contract and escrow documents which were executed on her behalf by Jeffrey Hill utilizing the forged and fraudulent power of attorney.

The property was sold to the Welks for $400,000.00. Kristin's 20% fee ownership interest was thus worth approximately $80,000.00. However, at the close of escrow in September 2006, a check was written out of the escrow payable to the order of Kristin Kuelbs' for only $45,845.77. The check was sent by the closing attorney to Jeffrey Hill at his mother's home, where he also resided. However, closing attorney reported to the IRS that Kuelbs had been paid approximately $57,000.00 on tax reporting Form 1099-S.

Thus, even if Kristin had agreed to sell her fee ownership interest, she did not receive anywhere near the $80,000.00 which she could have received. Kuelbs did not even receive the $57,000.00 which was reported to the IRS. The contract documents reveal that Lynn Welk, Jeffrey Hill and Kimberly Hill had inserted a false clause therein stating that Kristin Kuelbs had previous agreed to pay Lynn Welk $10,000.00 which was to be "repaid" from the purchase money for Kuelbs' ownership interest in the lake home. The real estate contract was signed for Kuelbs by Jeffrey Hill utilizing the forged power of attorney.

Upon Jeffrey Hill's receipt of the closing attorney's check in the amount of $45,845.77, made payable to the order of Kristin Kuelbs, he forged Kristin's signature to the check and deposited it into his personal TCF Bank account in September 2006.

Jeffrey Hill twice admitted to Detective Doug Matteson of the Eagan City Police Department, that he forged Kristin Kuelbs' signature to at least 4 of Kuelbs' checks totaling approximately $156,000.00.)

The following month, October, 2006, after embezzling Kristin Kuelbs' money and property; Kim Hill, Jeffrey Hill, Carol Hill with the assistance of Lynn (Hill) Welk, filed a Petition for the Involuntary Commitment of Kristin Kuelbs to the Wisconsin mental health system for a six (6) month evaluation of Kuelbs' mental health.

After only three (3) months, having been evaluated in three (3) separate mental health facilities, the State of Wisconsin filed its motion to dismiss Kristin Kuelbs' case and the Polk County, Wisconsin Probate Court entered its Order Dismissing Kristin's involuntary commitment on February 16, 2007. With the dismissal of the case and no guardian having been appointed by the Court, Kuelbs was presumed to be a legally competent person whom could thereafter come, go and live wherever she chose, which she did do.

Respectfully, the Eight Circuit Court of Appeal's statement that "A Wisconsin court determined Kuelbs **could receive care in a less restrictive setting** and released her to Donald [Donald C. Hill, Jr.,] . . ." is a material error of fact. (App. 3a)

The Wisconsin Probate Court's Order of Dismissal says nothing about Kuelbs "receiving any care" after her release. The Wisconsin Probate Court's order of dismissal merely states that Kristin Kuelbs should live in a "less restrictive environment"

referencing the case worker's letter to the court and the fact that the Wisconsin mental health facilities are all "**locked facilities**."

It is believed that most legally competent, non-criminal persons living in the United States should live in a "less restrictive environment," and not be "locked-down" in a government facility.

Pursuant to the Polk County Probate Court's dismissal order and the recommendations of the case worker, Court authorities prepared several Powers of Attorney which Kristin Kuelbs voluntarily executed at the Polk County, Wisconsin Courthouse on February 19, 2007, three (3) days after her case was dismissed, making her oldest brother, Donald C. Hill, Jr., Esq., and his wife, Edwardena C. Hill (subsequently the Trustees of Kristin's Irrevocable Trust), her true and valid attorneys-in-fact.

Court authorities would not have allowed Kristin Kuelbs to execute the several powers of attorney prepared by Court authorities if Kuelbs had not been determined to be legally competent when her case was dismissed on February 16, 2010.

It should be noted that legally "incompetent" people cannot execute a valid power of attorney. In contrast, "Incapacitated" or "Mentally Ill" persons are deemed to be legally "competent" and may execute valid powers of attorney as testified to by the Polk County Assistant Corporate Legal Counsel, Malia Malone [the Polk County "District Attorney" for commitment cases].

When Kuelbs arrived in Arkansas, having driven her Lincoln Navigator on or about February 19, 2007, she informed her attorney and attorney in fact; Donald C. Hill, Jr., that the sibling Defendants had fraudulently contracted and conveyed her fee ownership interest of the family lake home which had been revealed to her while she was being held by the Wisconsin authorities and further, that she had not yet received the $263,744.00 property settlement money from her ex-husband nor the personal property she had been awarded out of the divorce.

Subsequently, on March 04, 2007, Kuelbs expressly contracted with Donald C. Hill, Jr., being a licensed Minnesota Attorney, to assist her in locating and recovering her assets and additionally, to assist with her finances, tax, financial and estate planning matters in accord with the attorney-client agreement and the general durable power of attorney which she had executed at the Polk County Court house on February 19, 2007, three (3) days after her case was dismissed by the Polk County Probate Court.

The use of the forged power of attorney was subsequently revealed by attorney Tuttle when she forwarded a copy of the forged and fraudulent power of attorney to Donald C. Hill, Jr., whom was substituting into the divorce case on a remaining visitation matter. When the sibling defendants had Kuelbs involuntarily committed, she lost normal, unsupervised visitation with her two minor daughters.

Kuelbs noted that what purported to be Kuelbs' signature on the Jeffrey Hill power of attorney was not hers. Kuelbs filed a "Notice of Revocation" of the

forged document wherein she stated that she had never signed the Jeffrey Hill power of attorney. Forensic examination confirmed that Kuelbs' signatures on the stated documents were forged by the same person who forged Kuelbs' signature to the fraudulent power of attorney.

Investigation further revealed that Kuelbs had never closed her personal bank accounts and that the exhusband could have direct-deposited the $263,744.00 property settlement money therein at any time, but for the misrepresentation made to the divorce court by attorney Anne Tuttle and Jeffrey Hill that Kuelbs had previously closed her bank accounts.

The secreted American Century brokerage account was revealed when Kuelbs received an American Century Investment brokerage Account Statement. Both Jeffrey Hill and Kristin Kuelbs names were on the account. It was disclosed in correspondence from American Century that Jeffrey Hill had utilized the forged power of attorney to execute the contract to open the secreted brokerage account.

The brokerage account statement disclosed a remaining balance of $133,677.75. The account had been opened with $236,677.00, being the balance of Kristin Kuelbs' property settlement money after attorney Anne Tuttle paid herself the unpaid balance of attorneys fees of approximately $27,000.00 which Lynn Welk had refused to pay.

As set forth in the 8th Circuit Court of Appeal's decision, the American Century account statement

disclosed that Kuelbs' signature had been forged on three (3) checks which Jeffrey Hill wrote on the secreted brokerage account: $13,738.75 to Burnsville Volkswagen to purchase his daughter a 1994 Chrysler Sebring as noted on the check, a second check to "Chase" for $23,225.54. (App. 3a, 4a)

The 8th Circuit Court of Appeals decision noted that the three (3) checks were "suspect in that they were written or cashed when Kuelbs was in the mental facility in Wisconsin." (App. 3a)

Specifically commenting on the third check which Jeffrey Hill wrote to himself in the amount of $73,000.00, on which he also forged Kuelbs' signature, the Court's footnote 2, states that: "From the record it appears Jeffrey Hill and his brother-in-law, Lawrence Welk, Jr., used the $73,000.00 to purchase a property at 2888 Sibley Hills Drive in Eagan, Minnesota, which they developed into a subdivision called 'Sammy Sweet Cheeks.'" (App. 3a)

Kuelbs previously made written requests of Jeffrey Hill for an accounting in April and May 2007, including Kuelbs' personal, tax, business, legal and financial documents as the divorce court had been falsely advised that Kuelbs was living with her brother, Jeffrey Hill and her mother, Carol Hill, in their home in Eagan, MN.

When Lynn Welk and Jeffrey Hill subsequently learned that Kuelbs had discovered the secreted American Century brokerage account and that Kuelbs had wire-transferred her money therefrom into her existing ING Financial/Pershing account to keep

Jeffrey Hill from further embezzlement and conversion of her money, Lynn Welk forwarded a redacted American Century Investments "Account Statement" to Kristin Kuelbs and her attorney, and began a series of harassing telephone calls to the Hot Springs Village Police wherein she made numerous "wellness checks" on Kristin, also falsely alleging that the balance of Kristin Kuelbs' money in the secreted American Century brokerage account had been stolen by Donald C. Hill, Jr., Kristin's attorney-in-fact and legal counsel, Donald C. Hill, Jr. (App. 4a)

At Kuelbs request, Donald C. Hill, Jr., drafted and executed Kristin Kuelbs Irrevocable Trust in August 2007. Pursuant to the Attorney-Client agreement, the money recovered was directed to be used to pay the fees and costs necessary to recover the remainder of Kuelbs' assets plus the treble damages allowed by M.S.A.§523.22.

Subsequently, with Defendants continued refusal to account for the balance of Kristin Kuelbs' assets, on July 18, 2008, Kuelbs, being a legally competent woman, together with her Irrevocable Trust of which she is the sole Beneficiary, filed their original Complaint against the Defendants in the Arkansas State Circuit Court.

During the course of the litigation, on August 28 and 31, 2008, Kristin Kuelbs transferred her assets, the subject of the litigation, to her Irrevocable Trust, the co-Plaintiff in the ongoing case pursuant to Fed. R. Civ. P. 25(c). The asset transfer documents were admitted into evidence via Plaintiffs' Motion to Supplement the

Record which was granted by the 8th Circuit Court. (App.12a, *fn.* 4)

The 8th Circuit Court's Decision admits that "While the court, upon motion, may order **'the transferee to be substituted in the action or joined with the original party,' Id.," a substitution motion is not required for the action to continue."** (App. 10a)

Thus, with Kuelbs' transfer of assets during the course of the litigation, being more than just the "tort causes of action" referenced by the Court as clearly stated by Kuelbs in the two express, notarized, Irrevocable Assignments of August 28 and 31, 2008, respectively, as a matter of law, Plaintiffs were not required to make a "Substitution Motion" and it was therefore, error of law for the Court to have dismissed the case for lack of substitution of a "real party in interest,." thus preventing Plaintiffs from having continued access to the Court to recover Kuelbs' assets. (App. 10a)

The case was removed to Federal District Court by Defendants pursuant to Diversity of Citizenship jurisdiction on December 10, 2008, and Defendants immediately filed their Motions to Dismiss the Plaintiffs' original state court Complaint (which had been transferred to the Federal District Court when Defendants removed the state court case), falsely alleging that Kristin Kuelbs was legally incompetent when the original state court complaint had been filed.

Thereafter, Plaintiffs filed an Amended Complaint in Federal District Court on January 20,

2009, adding federal causes of action for Defendants' violation of the federal Civil Rico [18 U.S.C. §§1961, 1962, et. seq.], the Federal Securities and Exchange Act of 1934, as amended [[15 U.S.C. §78a, et. seq.], SEC Rule 10b-5, Section 206B of the Gramm-Leach-Bliley Act, and the Tax Reform Act of 1986, as amended, [Pub. L. 99-514, 100 Stat. 2085].

The Amended Complaint filed in the Federal District Court was based on Defendant siblings' breach of several contracts entered for the benefit of Kristin Kuelbs which thereafter allowed the Defendants to commit several "non-personal injury" torts, including the conversion of Kuelbs' $310,000.00, and the fraudulent conveyance of Kuelbs' 20% fee ownership of the family lake home to Lynn and Lawrence Welk, Jr. (App. 5a)

Respectfully, the 8th Circuit Court of Appeals statement that "shortly after Donald [Hill] commenced this suit, Kuelbs was declared incompetent pursuant to the petition filed by her sister, Kimberly" is just not true. (App. 5a).

The original case was filed by Kristin Kuelbs and her Irrevocable Trust, not "Donald" as mistakenly stated by the Court. Furthermore, the case was filed July 18, 2008, and it was not until some eight (8) months later that Kuelbs was declared "incapacitated" on March 19, 2009, some 16 months after Kimberly Hill had filed her Petition to have Kristin Kuelbs declared to be "incapacitated." (App 7a)

Thus, the Court's statement that Plaintiffs "were on notice" of Kristin Kuelbs' incompetency in December

2008, is error of fact. It is impossible for one to "be on notice" of an event that has not yet happened, particularly when Kuelbs was fighting the guardianship sought by Kimberly Hill.

As a mentally competent Plaintiff, it would have been error of law for Kuelbs to have plead either of her complaints in the name of a third-party as a "real party in interest." It was not until eight (8) months into the litigation, when on March 19, 2009, Kristin Kuelbs was determined to be legally "incapacitated" by the Garland County Probate Court, with no medical testimony having been presented by the evaluating facility and without the presence of Kristin Kuelbs at the 15 minute hearing whereat Kimberly Hill was appointed as Kuelbs' guardian.

The Federal District Court thereafter entered its April 14, 2009, Briefing Order requiring the parties to brief the issue of "real party in interest" as to Kuelbs.

The 8th Circuit Court's statement that "the order put the Plaintiffs on notice that a substitution motion may be required, and gave them time to substitute the real party". . . and further that "the district court dismissed the action because a substitution motion still had not been filed," is just NOT TRUE. (App 11a).

When both the guardian and conservator of Kuelbs refused to substitute in, Kuelbs' then became "Not Represented" and properly moved the Court to appoint a "Next Friend" for Kuelbs. The District Court denied Plaintiffs' motion and many requests therefore.

It is telling and should be noted that the 8th Circuit Court of Appeals refused to make any findings or otherwise discuss the Plaintiffs' "Next Friend" motion in its decision and also denied Appellant's Petition for Rehearing on the constitutional due process, equal protection issue. (App. 1a-12a) The 8th Circuit's Decision is written as if the Plaintiffs' "Substitution Motion" had never been filed by Plaintiffs.

As previously stated, the newly appointed guardian of the person [Kim Hill, being a named defendant in the ongoing Federal Court case] and Community First Trust Company, the separate conservator of Kuelbs' estate, both refused to intervene and join in the case as "real parties in interest" on Kuelbs' behalf, thus intentionally rendering Kuelbs to be **"Not Represented"** pursuant to FRCP 17 in the ongoing case.

Kimberly Hill, being a named Defendant and legally conflicted to serve as Kuelbs' "real party in interest," of course, refused to come forward to act as Kuelbs' "real party in interest," acting in her own self-interest in breach of her fiduciary duties as Kuelbs' guardian.

The District Court's dismissal of the case was affirmed without acknowledgment or comment by the 8th Circuit Court of Appeals such that under the facts of the case, any person who might read the decision would have no idea that Plaintiffs made the proper procedural motion for the appointment of a "Next Friend" to act as Kuelbs' "real party in interest" when the conservator of

the estate refused to substitute into the case to represent Kuelbs' interests.

In dismissing the case and affirming the dismissal, both the Federal District Court and the 8th Circuit Court of Appeals each cited different Arkansas statutes attempting to justify the dismissal of the case. However, the cited statutes relate ONLY to whom or what entity may first bring litigation on behalf of a Plaintiff determined to be legally incompetent PRIOR to the filing of the litigation. This is not the factual circumstance of the instant case where Kuelbs was legally competent when she filed both the original and amended complaints.

The Federal District Court dismissed the case applying Ark. Code Ann. §16-61-105, stating that "a **person previously determined to be legally incompetent** [emphasis added] must sue through his/her guardian."] (App.16a)

The 8th Circuit Court affirmed applying Ark. Code Ann. §28-65-305 stating that "When there is a guardian of the estate, all actions between the ward . . . and third persons in which it is sought to . . . benefit the estate of the ward shall be prosecuted by . . . the guardian of the estate [the 'conservator']."] (App.7a)

Even if no motion had been made for the appointment of a "Next Friend," the Federal District Court was mandated by Rule 17(c)(2) to ***sua sponte*** enter its "appropriate" order to protect the statutory and constitutional rights of Kuelbs in accord with guaranteeing Kuelbs continued access to the federal court system to recover her property, a fundamental

right guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution.

The Federal District Court failed to do so, which error of law was affirmed by the 8th Circuit Court of Appeals.

REASONS FOR GRANTING THE PETITION

The Federal District Court's decision dismissing Plaintiffs' Amended Complaint, as affirmed by the Eighth Circuit Court of Appeals unconstitutionally denied Kristin Kuelbs, a citizen of the United States and her Irrevocable Trust, Kristin Kuelbs being the sole Beneficiary thereof, the fundamental right of continued access to the federal court system to continue seeking the recovery of their property and damages pursuant to the due process and equal protection guarantees of the Fifth and Fourteenth Amendments to the U.S. Constitution.

There is no adequate, independent basis to resolve the federal procedural and constitutional issues presented by the Courts' Decisions. Specifically, there is a need for nationwide uniformity with regard to the application of the many Federal District Courts of Rules 17, 24 and 25 of the Federal Rules of Civil Procedure and the Fifth and Fourteenth Amendments of the U.S. Constitution, to the fact situation of what orders a Federal District Court is obligated to enter when a Plaintiff is determined to be "incapacitated" while the Plaintiff's case is ongoing.

First, the 8th Circuit Court of Appeal's decision is based on the Courts' erroneous assumption of fact that

Kuelbs was determined to be incapacitated "shortly after she filed her original complaint in state court on July 18, 2008. (App. 5a)

Second, as justification for the dismissal, the Court construed and applied separate Arkansas state statutes not applicable to the facts of this case, being applicable only to those Plaintiffs whom were previously declared to be legally incompetent prior to the filing of the litigation and for whom a conservator had been appointed prior to the filing of the litigation.

Kuelbs originally filed her complaint on July 18, 2008, while a legally competent person. Kuelbs was not determined to be incapacitated until March 19, 2009.

The timing of the Federal District Court's "Briefing Order" of April 14, 2009, which requested the parties to brief the issue of "real party in interest," admits the fact that Kristin Kuelbs had remained a legally competent Plaintiff until March 19, 2009, when she was first declared to be legally "incapacitated" by a Garland County, Arkansas Probate Court, some eight (8) months after she and her Irrevocable Trust first filed the original Complaint and some seventeen (17) months after Kristin Kuelbs formed her Irrevocable Trust, which is a co-Plaintiff in the case.

When Kuelbs' guardian and conservator both refused to substitute into the case as "real parties in interest," Kuelbs then became a person **"Not Represented."**

In the new status as a person **"Not Represented"** both Kuelbs and the Trustee of Kuelbs' Trust, being a co-Plaintiff, moved the District Court to:

> (1) appoint a "Next Friend" or other personal representative; or
> (2) allow the Trustee of the Trust, already a co-Plaintiff and the "Transferee" of certain of Kristin Kuelbs' assets being the subject of the litigation during the course of the litigation, to serve as "real party in interest" for Kristin Kuelbs, the sole beneficiary of her Irrevocable Trust; or
> (3) to enter such other order as required to protect the legal rights of Kristin Kuelbs in the ongoing litigation which action is mandated by Rules 17, 24 and 25 of the Federal Rules of Civil Procedure.

The Federal District Court erred in denying the Plaintiffs' request to have a personal representative appointed by the court, be it a "Next Friend" or other representative.

The fact that the Court refused to appoint a personal representative for Kuelbs, but then dismissed the case on the stated grounds that a personal representative had not substituted into the case for Kuelbs, is totally inconsistent. Respectfully, the ruling was an error of fact and law.

In dismissing, the Court relied on Ark. Code Ann. §16-61-105 [stating that a **person previously determined to be legally incompetent** [emphasis added] must sue through his/her guardian] (App. 16a). The dismissal was later upheld by the Eighth Circuit

Court of Appeals citing Ark. Code Ann. §28-65-305 [stating that "when there is a guardian of the estate, all actions between the ward . . . and third persons in which it is sought to . . benefit the estate of the ward shall be prosecuted by . . . the guardian (conservator) of the estate]. (App. 7a)

The 8th Circuit Court's opinion paradoxically states that in such circumstances it is "federal law [that] governs the substitution procedure in the district court . . ." citing its decision in the case of *Ashley County, Ark. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009) "(indicating federal procedural rules apply to procedural issues in diversity actions, while state law applies to substantive issues)." (App.8a)

The 8th Circuit Court of Appeal's decision goes on to state that: "The federal rules are not permissive, but mandatory, in requiring an action to be prosecuted by the real party in interest. See Fed. R. Civ. P. 17(a)." (App. 8a)

This is also the Petitioner's argument and understanding of the federal statutory law on the issue, but the Court's statement is not consistent with the Court's holding.

By the Court's own admission, if federal procedural rules are mandated to be applied to ongoing cases, then in affirming the District Court's dismissal, how is it possible for the 8th Circuit Court of Appeals to rely on an Arkansas statute having no applicability to the facts of this ongoing case, when Plaintiffs made the proper procedural motion for the appointment of a "Next Friend."

The 8th Circuit also denied Appellant's "Petition for Rehearing" on the statutory, procedural and constitutional issues set forth herein. [Documented in Appellants' Motion to Supplement] (App. 12a)

The 8th Circuit Court of Appeals disregarded as "misplaced" Plaintiffs' argument, to wit; that *arguendo,* even if an Arkansas statute could be held to be controlling of what are clearly federal statutory procedural matters in an ongoing Federal District Court case relative to issues of "real parties in interest," the Court disregarded Ark. Code Ann. §16-61-107.

Quoting the 8th Circuit Court's Opinion, Ark. Code Ann. §16-61-107 states that: "**Where a party is judicially found to be of unsound mind *during the pendency of an action* . . . his or her guardian *may* be joined with him or her in the action as such.**" [Emphasis added]. (App.8a)

By the 8th Circuit Court's own admission, once a case is ongoing, **no** Arkansas state statute could thereafter override the mandatory Federal Rules of Civil Procedure applicable to the facts of this case.

Tellingly, the 8th Circuit Court of Appeals refused to enter any findings or otherwise discuss the Federal District Court's denial of Plaintiffs' Motion for "Next Friend" or for the appointment of another personal representative or Kristin Kuelbs, which is indicative of the Court's realization that the Federal District Court did err as a matter of law in denying Plaintiffs' Motion for the "Next Friend" or the

appointment of other personal representative for Kristin Kuelbs as mandated by the Rules.

The question of the appropriateness of the appointment of a "Next Friend" or other personal representative as a "real party in interest" is a procedural question of "standing" and is reviewed *de novo*. *Magallon v. Livingston*, 453 F.3d 268 (8th Cir. 2006), *citing Dennis ex rel. Butko v. Budge*, 378 F.3d 880, 888 (9th Cir. 2004).

The Trust, to which Kuelbs had transferred her assets, which was more than her non-personal injury Tort claims, and therefore had standing as Kuelbs' "real party in interest" pursuant to Fed. R. Civ. P. 25(c) even without the filing of a "Substitution Motion."

Fed. R. Civ. P. 17(a) is cited by the 8th Circuit Court of Appeals as justification for its affirming the District Court's dismissal of the case stating: "An action *must* be prosecuted in the name of the real party in interest." We agree.

Kuelbs and her Trust were "real parties in interest" on the dates that the original and amended complaints were filed.

The Trust remained a valid "real party in interest" pursuant to FRCP Rule 24(a)(2) and (b)(1)(B) in addition to Rule 25(c) because of the assets transferred by Kuelbs to her Trust during the course of the litigation, which were the subject of the litigation, and which assets were not limited to only "tort" causes of action as set forth in the 8th Circuit Court's decision. (App. 6a, 8a)

In addition to the co-Plaintiff Trust, what person or entity could also have acted as a "real party in interest"on behalf of Kuelbs to allow her to continue their ongoing litigation to recover her property and damages?

In answering the question, FRCP 17(a)(1)(E) states that: "A trustee of an express trust" may serve;

Rule 17(a)(1)(F) states that "a party with whom or in whose name a contract has been made for another's benefit" may serve; and

Rule (a)(1)(G) states that "a party authorized by statute" may act as a "real party in interest."

The Arkansas Trustee statutes [Ark. Code Ann. §§28-73-811 through 28-73-816], mandate the Trustee to represent the best interests of the Trust and Beneficiary of the Trust.

Clearly, the Trustee of Kristin Kuelbs' Trust was a proper "party authorized by statute" three (3) times over, to serve as Kuelbs' "real party in interest" pursuant to Rule 17 and the cited statutes applicable to Arkansas Trusts.

Petitioners properly requested the District Court to recognize Edwardena C. Hill, the Trustee of Kristin Kuelbs' "express Irrevocable Trust" as Kuelbs' "real party in interest" pursuant to the provisions of Fed. R. Civ. P. 17 as above cited.

Plaintiffs' requests of the Court for the appointment of a "Next Friend" or other personal representative were unlawfully denied.

Surprisingly, the Decision of the Federal District Court stated that "no attempt was made to substitute the proper parties." (App. 17a) The case documents prove otherwise.

Fed. R. Civ. P. 17(c)(1) specifically states that a Plaintiff who came [comes] to the litigation **"With a Representative,"** [a person declared to be incompetent prior to the initial filing of the litigation], . . . then "the following representatives may sue or defend on behalf of a[n] incompetent person . . . :" **(C) a conservator, or (D) a like fiduciary."**

As Kuelbs was a legally "incompetent" person when she brought the litigation, Rule 17(c)(1) does not apply.

However, the Rule 17 does go on to state that if the Plaintiff either came to, **or during the course of the litigation**, finds herself to be (2) "**Without Representative**," then:

> "A[n] incompetent person who does not have a duly appointed representative **may sue by a "next friend"** or by a "guardian ad litem."" [FRCP 17(c)(2)] [Emphasis added]

Herein, the conservator refused to intervene on behalf of Kuelbs once she had been determined to be "incapacitated" on March 19, 2009, the conservator having accepted the conservancy on March 10, 2009.

Valerie Swearingen, appointed October 08, 2008. was never Kuelbs' guardian, but only a guardian ad litem for medical care should Kuelbs require it. (App. 5a) Swearingen never contacted Kuelbs while she served in that capacity.

Kim Hill, the newly appointed guardian, also refused to substitute in.

The analysis of the 8th Circuit Court of Appeals in this regard is flawed as it repeatedly speaks to the circumstance and assumes that Kuelbs had a qualified and willing party who would have agreed to "substitute in" within a reasonable time. (App. 10a)

That was not the fact situation here in that both the guardian and the conservator of Kuelbs' estate specifically refused to substitute in.

As Kuelbs had transferred her assets to her Trust during the course of the litigation, as a matter of law, there was no requirement for the Plaintiffs to have made any motion for substitution as held by the Court. Even if such a transfer of assets had not occurred, Plaintiffs properly moved the court for the appointment of a "Next Friend."

Moreover, when a person is **"Without a Representative"** as is the factual situation of this case, when Kuelbs' conservator refused to substitute in for her; then Rule 17(c)(2) further mandates the Federal District Court to do the following:

> **"The Court must appoint a guardian ad litem - or issue 'another appropriate order - to**

> **protect a[n] incompetent person who is unrepresented in the action**." [FRCP 17(c)(2)] [Emphasis added]

Thus, as a matter of fact and law, when Kristin Kuelbs became a Plaintiff "**Without Representative,**" then pursuant to FRCP 17(c)(2), the Court was mandated by the Rule to appoint a "Next Friend" or other personal representative as a "real party in interest," or otherwise enter an "appropriate order" as necessary to preserve Kristin Kuelbs' litigation and fundamental right of access to the courts pursuant to the due process, equal protection clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.

Respectfully, the Federal District Court's refusal to comply with mandatory requirement of FRCP 17(c)(2) was an abuse of discretion and clear error of law resulting in Kristin Kuelbs' unconstitutional denial of continued access to the federal court system guaranteed to her by the statute and the Fifth and Fourteenth Amendments to the U.S. Constitution. *Lawrence v. Texas*, 359 U.S. 558, 123 S. Ct. 2472 (2003).

The ***Standard of Review*** in issues of a party's guarantee of "fundamental rights" and access to the federal courts in a due process, equal protection case is the "strict scrutiny-compelling interest test." *Korematsue v. United States*, 323 U.S. 214, 65 S. Ct. 193 (1944).

In the case of *Clark v. Jeter 486 U.S. 586 (1988)*, dealing with the test to determine violations of the Equal Protection Clause, the Court stated that: "[W]e

apply different levels of scrutiny to different types of classifications . . . ." "At a minimum, a statutory classification . . . . affecting fundamental rights, are given the most exacting scrutiny." See also: *Kramer v. Union Free School District, 395 U.S. 621 (1969); Marston v. Lewis, 410 U.S. 679 (1973) and Burdick v Takushi, 504 U.S. 428 (1992).*

Under such circumstances, even if Plaintiffs had not made their motion for "Next Friend," it is respectfully urged that the Court should then have allowed Kuelbs to continue in the case under her own name pursuant to the 8th Circuit Court of Appeals holding in the case of *Kolocotronis v. Morgan,* 49 F.R.S. 3d 3, 247 F3d 726 (8th Cir. 2001).

The Court's decision denying Kuelbs fundamental right of continued access to the federal court system is in material conflict with the Court's previous decision in the case of *Kolocotronis v. Morgan,* 49 F.R.S.3d 3, 247 F.3d 726 (CA8, 2001).

Therein, the 8th Circuit Court of Appeals held that a mental patient had a fundamental right of access to the federal court system pursuant to the due process and equal protection clauses of our Constitution, and further, that the citizen's right extended to continuing the litigation in the Plaintiff's own name without a separate "real party in interest."

The Court's decision specifically mentioned the situation, as in this case, where the Ward might be attempting to recover assets from the Guardian.

Kimberly Hill is a named Defendant in this case who profited from the breach of contract which occurred in the sale of Kuelbs ownership interest in the family lake home wherein the parties utilized the forged and fraudulent power of attorney in the name of Jeffrey Hill, and therefore, profited from their wrongdoing, as did other of the sibling defendants.

In dismissing the present case, the 8th Circuit Court of Appeals has failed to rule consistently with its holding in the *Kolocotronis* case stating that Kuelbs, having been determined to be incompetent during the course of the litigation, had no right to continue the case in either her own name or with the Court's recognition or appointment of a "Next Friend" as requested by Plaintiffs and mandated by Rules 17, 24 and 25 of the Federal Rules of Civil Procedure.

An additional issue is the District Court's ruling, as upheld by the 8th Circuit Court of Appeals, that under Arkansas law, Kristin Kuelbs could not assign ***any*** Tort cause of action to her Irrevocable Trust of which she is the sole Beneficiary, citing the Arkansas case of *Mallory v. Hartsfield, Almand & Grisham, LLP*, 86 S.W.3d 863, 866 (Ark. 2002), which case involved solely a party's right to assign a tort involving the physical injury of the Plaintiff. (App. 6a, 8a) Kuelbs did not assign a personal injury tort to her Trust.

The 8th Circuit Court's holding renders it impossible in all circumstances for a Trust Grantor to transfer ***any tort, even those torts that are not personal injury torts***, to the Grantor/Beneficiary's Trust to assist the Grantor/Beneficiary in recovering the damages caused the Grantor/Beneficiary, which

damages will be used by the Trust, solely for the benefit of the Grantor/Transferor/Beneficiary. Moreover, the irrevocable assignments transfer ***all of Kuelbs assets, not just her tort causes of action.*** (Emphasis added.)

It is respectfully urged that there is no rational basis in law or fact to deny a Grantor/Settlor the right to capitalize her personal, express Trust with all property and property rights owned by the Grantor/Settlor together with the damages recovered therefrom.

Even if Kuelbs had suffered personal injury, as the sole Beneficiary of her Trust her assignment of the personal injury tort claim and damages to her Trust, and not a third person, Kuelbs' assignment was, in effect, to herself and therefore, legally permissible, even under the holding of the *Mallory case.*

Accordingly, it is respectfully urged that the 8th Circuit Court of Appeal's interpretation and application of the *Mallory* personal injury tort case is unconstitutionally over-broad.

Mallory should be limited solely to a Plaintiff's assignment of a personal injury tort claim to a third-person or entity and should not be construed to apply to a person's assignment of other, non-personal injury tort cases. Furthermore, parties often assign personal injury subrogation claims.

Placing additional burdens on . . . disadvantaged persons is contrary to the basic concept of our system which requires that the legal burdens should bear some

rational relationship to an individual's responsibility or wrongdoing." *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

The Court's dismissal of Plaintiffs' case without appointing a personal representative also unlawfully impaired Kuelbs' fundamental right to enforce her contractual property rights in violation of Article I, Section 10, and the Fifth and Fourteenth Amendments of the U.S. Constitution. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

In the case of *Tennessee v. Lane*, 541 U.S. 509 (2004), the court ruled that laws or the application of laws which exclude persons from exercising their "fundamental right of access to the courts are unconstitutional. See also; *Yick Wo v. Hopkins*, 118 U.S. 356, (1886).

Kuelbs and her Irrevocable Trust have been unconstitutionally denied access to the federal court system to recover their property and damages. There is no adequate and independent basis to resolve the conflicting federal procedural and constitutional issues presented by the Courts' holdings in this case and specifically, the 8th Circuit Court of Appeals refusal to make any findings concerning Plaintiffs' motion for the appointment of a "Next Friend" to continue to assert the Plaintiffs statutory and constitutional right of continued access to the federal court system pursuant to the due process, equal protection guarantees of the Fifth and Fourteenth Amendments to the U.S. Constitution.

There is, therefore, a need for the U.S. Supreme Court to establish nationwide uniformity with regard to the federal courts' interpretation and application of a Plaintiff's due process, equal protection right of access to the courts as mandated by Rules 17, 24 and 25 of the Federal Rules of Civil Procedure.

When a Plaintiff in an ongoing case is determined to be incapacitated during the course of litigation, and the newly appointed guardian and conservator refuse to intervene as "real parties in interest" for the Plaintiff; then as a Plaintiff "Without Representative" Rules 17, 24 and 25, mandate the Federal District Court to appoint a "Next Friend," other personal representative, or to enter an "appropriate order" to preserve the "Not Represented" party's fundamental right of continued access to the federal court system as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution.

Respectfully, the right of continued access to the federal court system should include the Plaintiff's right to continue her case in her own name when no other qualified party is willing to come forward to act as Plaintiff's "real party in interest," particularly where the Plaintiff is represented by legal counsel.

CONCLUSION

For the above-stated reasons, this Petition should be granted..

Respectfully submitted,

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No. 09-2697

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Kristin Hill Brasser Kuelbs; Kristin N. Kuelbs Irrevocable Trust, Appellants,

v.

Kimberly Hill; Jeffrey Hill; Carol Hill; Lynn Welk (Hill); Lawrence Welk, Jr.; Ryan Benson; American Century Services, LLC; American Century Investments; Rita Abernathy; Anne Tuttle; John Does 1-10, Appellees.

April 13, 2009, Submitted

July 30, 2010, Filed

Appeal from the United States District Court for the Western District of Arkansas.

COUNSEL: For Kristin Hill Brasser Kuelbs, Kristin N. Kuelbs Irrevocable Trust, Plaintiffs - Appellants: Donald C. Hill, Hot Springs Village, AR; Justin Byrum Hurst, HURST & MORRISSEY, Hot Springs, AR.

For Kimberly Hill, Jeffrey Hill, Carol Hill, Lynn Welk, (Hill), Lawrence Welk, Jr., Defendants - Appellees: Tylar Tapp, III, TAPP LAW FIRM, P.A., Hot Springs, AR.

For Ryan Benson, Defendant - Appellee: George Spence Fricke, Michael Lee Wright, BARBER &

MCCASKILL, Little Rock, AR; Andrew King, WILLIAMS & ANDERSON, Little Rock, AR.

For American Century Services, LLC, Rita Abernathy, Defendants - Appellees: Jess Askew, III, Andrew King, WILLIAMS & ANDERSON, Little Rock, AR.

For Anne Tuttle, Defendant - Appellee: John Carter Fairley, BARBER & MCCASKILL, Little Rock, AR; Andrew King, WILLIAMS & ANDERSON, Little Rock, AR.

Before BYE, COLLOTON, and GRUENDER, Circuit Judges.

BYE, Circuit Judge.

Kristin Kuelbs and the Kristin N. Kuelbs Irrevocable Trust appeal the dismissal of the claims they brought against several defendants alleging embezzlement of Kuelbs's assets. The claims brought by Kuelbs were dismissed because the district 2 court[1] determined she was not the proper party to pursue the action due to her incompetency, and she did not move to substitute the proper party after being put on notice of the need for substitution. The tort claims Kuelbs assigned to the Irrevocable Trust were dismissed on the grounds they were not assignable under Arkansas law. We affirm.

I

Kuelbs suffered a brain injury in a car accident in March 2001. Her subsequent behavior caused problems in her marriage, and her husband divorced her in December 2005. She received a property settlement in

excess of $ 250,000, and an ongoing award of monthly spousal support. Her ex-husband received custody of the couple's two daughters, with Kuelbs entitled to visitation every other weekend. After the daughters expressed concerns about their mother's behavior while they were in her care, Kuelbs's ex-husband successfully petitioned the divorce court to have Kuelbs's visitation rights limited to supervised visitation. Members of Kuelbs's family also became concerned about her erratic behavior. Her mother (Carol Hill), a sister (Kimberly Hill), and a brother (Jeffrey Hill) petitioned a Wisconsin state court to have Kuelbs committed to a mental facility. In November 2006 she was committed to a mental facility for a period of six months.

While in the mental facility, Kuelbs contacted her oldest brother, Donald Hill, a lawyer, and asked for help in obtaining her release. A Wisconsin court determined Kuelbs could receive care in a less restrictive setting, and released her to Donald based on his representation he could provide her with shelter, food, and medical support at his home in Arkansas. Kuelbs moved to Arkansas to live with Donald and his wife, Dena, on February 19, 2007.

After Kuelbs moved to Arkansas, Donald discovered some irregularities in her American Century Investment account, the account in which her property settlement had been placed. A check dated February 21, 2007 (after Kuelbs had already moved to Arkansas) was purportedly signed by her and made payable to her brother, Jeffrey Hill, in the amount of $ 73,000. The check had "House Construction Deposit" written in the memo line.[2] Two other checks were also suspect in that they were written or cashed when Kuelbs was in the

mental facility in Wisconsin. One check, dated October 28, 2006, was in the amount of $ 13,738.75 and made payable to Burnsville Volkswagen. Another check, dated November 24, 2006, was in the amount of $ 23,225.54 and made payable to Chase.

A dispute arose between Donald and the rest of Kuelbs's family about her well-being, with both sides accusing the other side of taking advantage of her. For example, in August 2007, Lynn Welk, another of Kuelbs's sisters, contacted the police department in Hot Springs Village, Arkansas, asking them to conduct a welfare check on Kuelbs. Welk wanted the police to tell Kuelbs her checking account with American Century Investments had been emptied. She also asked the police to positively identify Kuelbs before relaying the message, claiming her sister-in-law, Dena, posed as Kuelbs at times. Welk claimed Kuelbs was not taking her medication and was not mentally stable. When the police tried to conduct a welfare check, Kuelbs refused to talk to the officers and called the police. She still refused to talk to the officers even when the dispatcher confirmed the officers were police officers.

In November 2007, Kuelbs's sister Kimberly filed a petition in Arkansas state court requesting a determination of Kuelbs's mental competency. While the competency action was pending, Donald filed this action in Arkansas state court against his mother Carol, brother Jeffrey, sisters Kimberly and Lynn, brother-in-law Lawrence Welk, Jr., American Century, and others alleging tort claims of outrage, abuse of process, fraud/misrepresentation, deceit, breach of fiduciary duty, and civil conspiracy. The gravamen of the suit alleged a conspiracy between the family members and

others to embezzle Kuelbs's money, and included allegations against Jeffrey Hill regarding the three suspect checks written on the American Century Investment account. The suit was brought in Kristin Kuelbs's name personally, as well as in the name of an "Irrevocable Trust" Donald created for the purpose of accepting an assignment of Kuelbs's tort claims.

Shortly after Donald commenced this suit, Kuelbs was declared incompetent pursuant to the petition filed by her sister, Kimberly. The state court initially appointed the Trust Department of First National Bank in Hot Springs as the guardian of Kuelbs's estate. Later, the Community First Trust Company (First National Bank's trust subsidiary) was substituted as the guardian of her estate. The court initially appointed an individual by the name of Valerie Swearingen to be a limited guardian of Kuelbs's person. The court subsequently changed the guardian of Kuelbs's person a number of times.

The defendants in this action removed it from Arkansas state court to federal district court and filed motions to dismiss asserting lack of personal jurisdiction. The defendant members of the Hill family further asserted the action should be dismissed because Kuelbs and the Irrevocable Trust were not the proper parties due to Kuelbs's incompetency.

Donald then requested leave of court to file an amended complaint, and was granted leave. To the tort claims originally asserted in the first complaint, he added claims for civil racketeering under the federal RICO statute, 18 U.S.C. § 1961, and a securities claim under Ark. Code Ann. § 23-42-103. The amended complaint

responded to some, but not all, of the defendants' personal jurisdiction assertions. It failed, however, to address the contention that Kuelbs and the Irrevocable Trust were not proper parties. All of the defendants responded to the amended complaint by renewing their motions to dismiss and arguing, in relevant part, that Kuelbs and the Irrevocable Trust were not the real parties in interest because Kuelbs had been declared incompetent.

On April 14, 2009, the district court entered an order which stated in part that the amended complaint "failed to address Defendants' contention that Plaintiffs lack the capacity to sue and are not authorized to bring this action due to the appointment of a guardian in Garland County Circuit Court. Plaintiffs are directed to supplement their responses by April 27, 2009, to address this issue[.]" On April 22, 2009, Donald filed a response which raised issues regarding a purported conflict of interest involving the guardian of Kuelbs's person, but which failed to discuss or address whether the guardian of Kuelbs's estate may be the proper party to pursue a lawsuit seeking monetary damages.

On June 17, 2009, the district court granted the motions to dismiss. The district court indicated the plaintiffs had been given notice the defendants had objected to their status as the real parties in interest, and no attempt was thereafter made to substitute the real party in interest. The district court further determined the tort claims purportedly assigned to the Irrevocable Trust were not assignable under Arkansas law, and thus the Irrevocable Trust was not a proper party either. This timely appeal followed.

II

We review a district court's decision to grant a motion to dismiss de novo. See, e.g., Anderson-Tully Co. v. McDaniel, 571 F.3d 760, 762 (8th Cir. 2009).[3] We also review de novo both the district court's interpretation of the Federal Rules of Civil Procedure, Ind. Lumbermens Mut. Ins. Co. v. Timberland Pallet & Lumber Co., 195 F.3d 368, 374 (8th Cir. 1999), as well as its interpretation of Arkansas state law. Mountain Pure, LLC v. Turner Holdings, LLC, 439 F.3d 920, 923 (8th Cir. 2006).

We first address who became the real party in interest after Kuelbs was declared incompetent.[4] "In a diversity action, state law determines the issue of who is a real party in interest." Jaramillo v. Burkhart, 999 F.2d 1241, 1246 (8th Cir. 1993). When Kuelbs was declared incompetent, the state court appointed both a guardian of her person and a guardian of her estate. When a guardian of the estate is appointed, Arkansas law requires the guardian of the estate to pursue a lawsuit seeking monetary damages that will benefit the incompetent person's estate. See Ark. Code Ann. § 28-65-305 ("When there is a guardian of the estate, all actions between the ward . . . and third persons in which it is sought to . . . benefit the estate of the ward *shall* be prosecuted by . . . the guardian of the estate[.]") (emphasis added). At all relevant times, the Community First Trust Company was the guardian of Kuelbs's estate, and thus was the real party in interest for purposes of pursuing the tort claims in this case. The district court therefore correctly determined Kuelbs was not the real party in interest.[5] The district court also correctly determined the Irrevocable Trust was

not the real party in interest, because neither tort claims nor the proceeds of tort claims are assignable under Arkansas law. See Mallory v. Hartsfield, Almand & Grisham, LLP, 350 Ark. 304, 86 S.W.3d 863, 866 (Ark. 2002).

The appellants argue that, even assuming the guardian of the estate was the real party in interest, the district court still erred in dismissing this action. They contend that substituting the guardian of the estate was permissive, rather than mandatory, under Arkansas law. See Ark. Code Ann. § 16-61-107 ("Where a party is judicially found to be of unsound mind during the pendency of an action . . . his or her guardian *may* be joined with him or her in the action as such.") (emphasis added). This reliance upon Arkansas law is misplaced. Although Arkansas law governed who the real party in interest became after Kuelbs was declared incompetent, federal law governs the substitution procedure the district court followed. See, e.g., *Ashley County, Ark. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009) (indicating federal procedural rules apply to procedural issues in diversity actions, while state law applies to substantive issues). The federal rules are not permissive, but mandatory, in requiring an action to be prosecuted by the real party in interest. See Fed. R. Civ. P. 17(a) ("An action *must* be prosecuted in the name of the real party in interest.") (emphasis added).

Rule 25 of the Federal Rules of Civil Procedure sets forth the substitution procedure to be followed when a party becomes incompetent while an action is pending. The rule governs four situations: (1) when a party dies, (2) when a party becomes incompetent, (3) when a party transfers its interest in the lawsuit to someone

else, and (4) when a public officer is a party and dies, resigns, or otherwise ceases to hold office. See Fed. R. Civ. P. 25(a), (b), (c) and (d). A party's obligation to request substitution, and the corresponding ability of the court to allow substitution, are somewhat different in each situation. While our concern is only with the second situation, a party's obligation to bring a substitution motion in that situation (and the corresponding limits on the court's authority) becomes more evident by comparing all four situations to each other.

When a party dies, a motion for substitution must be brought before the court may order substitution, and "[i]f the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent *must* be dismissed." Id. at 25(a)(1) (emphasis added). Similarly, when a party becomes incompetent, a motion for substitution is required before a court may order substitution. See id. at 25(b) ("If a party becomes incompetent, the court may, *on motion*, permit the action to be continued by or against the party's representative.") (emphasis added). Thus, when reading Rule 25(b) in conjunction with Rule 17(a)'s requirement that an action *must* be prosecuted by the real party in interest, the court has no power to permit such an action to continue without the real party in interest unless a motion for substitution is brought under Rule 25(b). Cf. *Younts v. Fremont County, Iowa*, 370 F.3d 748, 752 (8th Cir. 2004) (construing Rule 25(a) and explaining that "a motion for substitution must be filed by the proper person [in order for] a court to order a substitution of a proper party," and directing the district court to dismiss the claims brought by a party who died while the action was pending if a "motion for

substitution under Rule 25 [is] not filed promptly with the district court[.]").

In contrast, if a party transfers an interest while a case is pending, "the action may be continued by or against the original party[.]" Fed. R. Civ. P. 25(c). While the court, upon motion, may order "the transferee to be substituted in the action or joined with the original party," id., a substitution motion is not required for the action to continue. Similarly, when a party is a public officer who dies, resigns, or otherwise ceases to hold office while a case is pending, a substitution motion is not required. Rather, "[t]he officer's successor is automatically substituted as a party" and "the absence of [a substitution order] does not affect the substitution." Id. at 25(d).

In sum, in an action in which a party becomes incompetent while the action is pending, a motion for substitution must be brought under Rule 25(b) for the action to continue. Consequently, a district court does not err in dismissing such an action after an objection has been made that the person deemed incompetent is not the real party in interest, so long as the district court allows a reasonable time for the real party in interest to be substituted. See Fed. R. Civ. P. 17(a)(3) ("The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action."); see also *Consul Gen. of Republic of Indonesia v. Bill's Rentals, Inc.*, 330 F.3d 1041, 1047-48 (8th Cir. 2003) (computing the "reasonable time" under Rule 17(a)(3) from the time an objection is

first made until the district court enters an order dismissing the case).

The defendant members of the Hill family contended Kuelbs was not the real party in interest in their first motion to dismiss filed on December 19, 2008. On April 14, 2009, the district court directed the plaintiffs to address the issue of Kuelbs's incompetency. The order put the plaintiffs on notice that a substitution motion may be required, and gave them time to substitute the real party. On June 17, 2009, six months after the Hill defendants first objected that Kuelbs and the Irrevocable Trust were not the real parties in interest, the district court dismissed the action because a substitution motion still had not been filed. n6 The procedure followed by the district court was consistent with, and required by, Rules 17 and 25 of the Federal Rules of Civil Procedure. Thus, the district court did not err in dismissing this action.

III

We affirm the judgment of the district court.

Footnotes

1The Honorable Robert T. Dawson, United States District Judge for the Western District of Arkansas.

2From the record it appears Jeffrey Hill and his brother-in-law, Lawrence Welk, Jr., used the $ 73,000 to purchase a property at 2888 Sibley Hills Drive in Eagan, Minnesota, which they developed into a subdivision called "Sammy Sweet Cheeks."

3When dismissal is granted on the grounds a suit is not being prosecuted by the real party in interest, at least one court has applied abuse-of-discretion review to the ultimate question whether dismissal of the action was appropriate. See *Magallon v. Livingston*, 453 F.3d 268, 271 (5th Cir. 2006) (reviewing de novo the preliminary question whether a party is a real party in interest, but then reviewing whether dismissal of the action was appropriate for an abuse of discretion). Because we conclude the district court properly dismissed this action even under the more stringent de novo standard, we do not need to decide whether an abuse-of-discretion standard should apply.

4The pending motion to supplement the record is granted.

5The appellants' contentions regarding purported conflicts-of-interest involving the guardian of Kuelbs's person are irrelevant, because the personal guardian is not the real party in interest. As a result, there is no need to address the contentions.

6The appellants do not argue on appeal that six months was not a "reasonable time" under Rule 17(a)(3), and thus we do not address that issue.

Civil No. 08-1610

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS, HOT SPRINGS DIVISION

Kristin Hill Brasser Kuelbs; Kristin N. Kuelbs Irrevocable Trust, Plaintiffs,

v.

Kimberly Hill; Jeffrey Hill; Carol Hill; Lynn Welk (Hill); Lawrence Welk, Jr.; Ryan Benson; American Century Services, LLC; American Century Investments; Rita Abernathy; Anne Tuttle; John Does 1-10, Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on motions by Separate Defendants, American Century Services, LLC (Docs. 6 & 25); Ryan Benson (Docs. 8 & 30); Anne Tuttle (Docs. 10 & 28); Kimberly Hill, Jeffrey Hill and Carol Hill (Docs. 12 & 27); and Rita Abernathy (Docs. 17 & 25), to dismiss Plaintiffs' Amended Complaint . Also[1] before the Court are Plaintiffs' responses (Docs. 32-33, 40, 52)and replies from American Century Services, LLC and Rita Abernathy (Doc. 34, 51); Anne Tuttle (Doc. 35, 54); Ryan Benson (Doc. 36, 53); and Carol Hill, Jeffrey Hill and Kimberly Hill (Doc. 42).

Introduction

Plaintiffs filed their original complaint on July 18, 2008,in the Circuit Court of Garland County alleging

claims for outrage, abuse of process, fraud, misrepresentation, deceit, breach of fiduciary duty and civil conspiracy (Doc. 2). On December 10, 2008, Separate Defendant American Century Services, LLC removed the action to this Court (Doc. 1). On January 20, 2009, Plaintiffs filed an Amended Complaint adding an alleged RICO violation (Doc. 24). Defendants contend the action should be dismissed due to lack of personal jurisdiction and that Plaintiffs are not the real parties in interest under Rule 17 of the Federal Rules of Civil Procedure.

On October 30, 2006, after consideration of a petition for examination submitted by Jeff, Carol and Kimberly Hill, the Circuit Court of Polk County in Wisconsin ordered a temporary commitment of Kristin Kuelbs pending a preliminary hearing (Doc. 32-2). On November 13, 2006, Polk County Circuit Court ordered the involuntary medication, treatment and commitment of Kristin Kuelbs due to "mental illness" finding Kristin "not competent to refuse psychotropic medication or treatment because [she] is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives" (Doc. 32-2).

On February 16, 2007, the Polk County Mental Health & Chemical Dependency Unit requested an early dismissal of Kristin Kuelbs to a less restrictive setting, i.e. Donald Hill's home in Arkansas and suggested she complete a Durable Power of Attorney for finances and a Power of Attorney for Health Care (Doc. 32-2). The Court dismissed the matter that same date (Doc. 32-2). A Durable Power of Attorney was executed in favor of

Donald and Edwardena Hill on February 19, 2007 (Doc. 32-2).

On November 20, 2007, Separate Defendant Kimberly Hill filed a Petition for Appointment of a Guardian for Kristin Kuelbs in the Circuit Court of Garland County, Probate Division, No. P 2007-610. (Doc. 12-1). On August 28, 2008, the Court appointed Valerie Swearingen, LCSW, as a limited guardian for Kristin Kuelbs, to "have authority over all of Ms. Kuelbs' medical decisionmaking..."(Doc. 12-3). The Court appointed the Trust Department of First National Bank in Hot Springs, Arkansas as the guardian of the estate for Kristin Kuelbs (Doc. 12-3).

On December 17, 2008, the Court relieved Valerie Swearingen as limited guardian of the person of Kristin Kuelbs and appointed Donald Hill (Doc. 43-2). On March 19, 2009, the Court removed Donald Hill as limited guardian of Kristin and appointed Kimberly Hill due to Donald Hill's failure to comply with the Court's orders (Doc. 43-4).

Discussion

Rule 17 of the Federal Rules of Civil Procedure provides that an action must be prosecuted in the name of the real party in interest. This rule requires that the party who brings an action actually possess, under the substantive law, the right sought to be enforced." *United HealthCare Corp. v. American Trade Ins. Co., Ltd.*, 88 F.3d 563 (8 Cir. 1996). Because this matter is before the Court pursuant to diversity jurisdiction, the Court must apply Arkansas' substantive law to determine whether Separate Plaintiffs Kristin Kuelbs

and the Irrevocable Trust of Kristin N. Kuelbs are real parties in interest in connection with the causes of action alleged in Plaintiffs' Amended Complaint.

Section 16-61-105(a)(1) provides that an "action of a person judicially found to be of unsound mind must be brought by his or her guardian..." It is clear pursuant to Arkansas law that Plaintiff Kristin Kuelbs lacks the capacity to sue and that the real party in interest is her guardian. *See* Ark. Code Ann. § 16-61-105(a)(1). Therefore, Separate Plaintiff Kristin Kuelbs is not a real party in interest pursuant to Rule 17.

Plaintiffs contend that Kristin Kuelbs assigned her claims to the Trust, therefore, the Court should substitute the Trustee, Edwardena Hill, as a plaintiff. There are no allegations in the Amended Complaint that purport to state any cause of action on behalf of the Trust. The Trust is only mentioned in the caption and the opening paragraph of the Amended Complaint. Further, neither tort claims nor their proceeds are assignable. *Mallory v. Harsfield, Almand & Grisham, LLP*, 86 S.W. 3d 863 (Ark. 2002). Therefore, the Trust is not a real party in interest in connection with the claims set forth in the Amended Complaint pursuant to Rule 17.

Plaintiffs' responses to the motions to dismiss consist mostly of Plaintiffs' recitations of what they believe are the facts of this case but failed to address the initial procedural problems with this action. On April 14, 2009, the Court directed Plaintiffs to supplement their responses to Defendants' Motions to Dismiss as Plaintiffs failed to address Defendants' contention that Plaintiffs lack the capacity to sue and are not

authorized to bring this action. The Court further directed Plaintiffs to address any conflict raised by Donald C. Hill's representation in this matter in which he appears to be a key witness to Plaintiffs' allegations (Doc. 39). Accordingly, Plaintiffs were on notice that the question of whether they were real parties in interest was before this Court, and no attempt was made to substitute the proper parties.

Conclusion

The Court finds that Plaintiffs are not authorized to bring this suit as they are not the real parties in interest. The Court put Plaintiff's counsel on notice and no attempt has been made to substitute the proper parties. Accordingly, Defendants' Motions to Dismiss are GRANTED, and Plaintiffs' Amended Complaint is DISMISSED. The Motion for Recusal (Doc. 4), to Transfer (Doc. 5) and for the Appointment of "Next Friend" (Doc. 41) are DENIED AS MOOT.

IT IS SO ORDERED this 17 day of June 2009.

/s/ Robert T. Dawson
Honorable Robert T. Dawson
United States District Judge

Footnote

1Subsequent to the filing of the initial motions to dismiss by Separate Defendants, the Court permitted Plaintiffs to file an amended complaint. Separate Defendants were advised they could supplement their motions to dismiss subsequent to the filing of the amended complaint which they have done. Accordingly,

the Court will consider the initial motions in addition to the supplemental motions.

Filed 9/8/2010
No. 09-2697
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Kristin Hill Brasser Kuelbs; Kristin N. Kuelbs Irrevocable Trust, Appellants,

v.

Kimberly Hill; Jeffrey Hill; Carol Hill; Lynn Welk (Hill); Lawrence Welk, Jr.; Ryan Benson; American Century Services, LLC; American Century Investments; Rita Abernathy; Anne Tuttle; John Does 1-10, Appellees.

Appeal from the United States District Court for the Western District of Arkansas.

ORDER

The petition for rehearing by the panel is denied